IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 59 of 1997

with

SPECIAL CIVIL APPLICATION No 6082 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and Sd/-

Hon'ble MR.JUSTICE P.B.MAJMUDAR Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES YES

2. To be referred to the Reporter or not? YES :

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO NO

5. Whether it is to be circulated to the Civil Judge? : NO NO

THE VISNAGAR TALUKA AUDYOGIK- SAHAKARI MANDLI LTD.

Versus

COMMISSIONER OF INCOME-TAX

Appearance:

MR KA PUJ for Petitioner

MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE B.C.PATEL and

MR.JUSTICE P.B.MAJMUDAR

Date of decision: 22/09/1999

ORAL JUDGEMENT (Per B.C.Patel, J.)

At the instance of the assessee and the Revenue, reference is before the Court raising the following two questions each:

(By assessee)

"1. Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal is justified in law in upholding the addition of Rs.1,18,05,966/- made by the Assessing Officer on account of Excise Duty Refund by invoking the provisions of section 41 (1) of the Act, and confirmed by CIT (Appeals)-VIII, Ahmedabad?

2. Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal is justified in law in considering the amount of Rs.1,18,05,960/- received by the applicant on account of refund of Excise Duty, as income of applicant, in spite of the fact that the amount received is not undisputably earned by the applicant without any encumbrance and that the appeal is still pending before the Hon'ble Supreme Court?"

(By Revenue)

"1. Whether, the appellate Tribunal is right in law and on facts in allowing the assessee to raise additional claim under section 80-HH ?

2. Whether, the Appellate Tribunal is right in law and on facts in permitting the assessee to file audit report for the purpose of claiming deduction under section 80-HHC ?"

2. We have also considered the facts as mentioned in Special Civil Application No.6082 of 1999. From the record it transpires that the assessee received refund of Rs.1,18,05,960 from the Central Excise Department during the year 1991-92. It is the case of the Revenue that the assessee is maintaining accounts on cash basis and during the examination of the books of account, it was found that the refund received has been placed under sub head 'liability' under the head "Other Liabilities". In view of this, the assessee was asked to show cause as to why Excise Duty Refund should not be treated as its income under section 41 (1) of the Income-tax Act, 1961 (hereinafter referred to as the Act).

3. It transpires that, before Excise Authorities, the assessee submitted a claim of totalling to Rs.2,12,01,581 arising from Order-in-Appeal No.GSM/415/89/Ahd dated 27.2.1989 passed by the Collector of Central Excise (Appeals), Bombay on the classification dispute of product Paper Based Decorative Laminated Sheets in which the product has been held to be classifiable under SH 4811.39 against the Order-in-Original No.63/87 dated 15.12.1987 passed by the Assistant Collector of Central Excise, Ahmedabad classifying the product under SH 3920.31. The Collector of Central Excise, Ahmedabad filed an appeal before the Customs, Excise and Gold (Control) Appellate Tribunal (hereinafter referred as "CEGAT") for restoration of Order-in-Original No.63/87. The assessee also preferred an appeal against the said Order-in- Appeal dated 28.2.1989 claiming that the product should be classified under SH 4818.90. The CEGAT by an order dated 29.9.1989/4.10.1989 allowed the appeal preferred by the assessee and dismissed the appeal preferred by the Collector and classified the product under SH 4818.90 for the period upto 28.2.1988 and under SH 4823.90 from 1.3.1988 with consequential relief for the period from 15.12.1986 to the date of passing of the order. As no refund was granted to the assessee, the assessee preferred Special Civil Application No.633 of 1990 before this Court. Division Bench hearing the Special Civil Application granted interim relief directing the Central Excise authorities to refund the amount of differential duty to the assessee on conditions that the assessee shall give a bank guarantee to the extent of 75% and a security for the remaining 25% of the amount. The Excise Department being aggrieved by the order passed by the CEGAT, carried the matter before the Apex Court. The Apex Court admitted the appeal but there was no stay against payment of Excise Duty Refund. It transpires that the Assistant Collector of Central Excise, Mehsana ultimately granted refund of Rs.1,18,05,966.74 paise. When the Tribunal (under the Act) was hearing the matter, the appeal preferred by the Excise Department was pending before the Apex Court with regard to the refund and thus, there was no finality of the order.

3.1 The Assessing Officer held that the provisions of section 41 (1) of the Act are clearly applicable so far as refund is concerned despite the fact that the matter was pending before the Court and there was no final adjudication. The Assessing Officer held that the amount of refund is required to be added to the total income. Aggrieved by the order passed by the Assessing Officer, an appeal was preferred. However, the same was rejected

and ultimately the assessee moved the Tribunal by preferring ITA No.2805 of 1995. The Tribunal rejected the appeal preferred by the assessee and thus confirmed the finding recorded by Assessing Officer as well as of the Appellate Officer. Against this order, the reference is at the instance of the assessee.

3.2 So far as deduction under section 80-HHC of the Act is concerned, the Appellate Officer held that the Assessing Officer was justified in not allowing any deduction under section 80-HHC. Before the Tribunal the assessee contended that Excise Duty Refund was not taxable as business income of the year and it had no occasion or opportunity to file audit report. The Tribunal was of the view that the income should be included in the year, i.e. 1991-92 under section 41 (1) of the Act which is deemed business income and held that the assessee should be permitted to file its audit report to obtain deduction under Section 80-HHC. Against this order, the Revenue has sought reference before this Court as mentioned hereinabove.

4. Before us it was submitted that reading section 41 (1) of the Act, it is clear in the instant case that the authorities have erred in invoking the provisions contained in section 41 (1) of the Act. The said section reads as under:

> "Sec.41 (1) Where an allowance or deduction has been made in the assessment for any year in respect of loss, expenditure or trading liability incurred by the assessee (hereinafter referred to as the first-mentioned person) and subsequently during any previous year,-
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> (a) the first-mentioned person has obtained, whether in cash or in any other manner whatsoever, any amount in respect of such loss or expenditure or some benefit in respect of such trading liability by way of remission or cessation thereof, the amount obtained by such person or the value of benefit accruing to him shall be deemed to be profits and gains of business or profession and accordingly chargeable to income-tax as the income of that previous year, whether the business or profession in respect of which the allowance or deduction has been made is in existence in that year or not."

5. It is contended before us that, so far as the Central Excise Duty Refund is concerned, the matter was

subjudice when the amount was received and, therefore, the assessee was not liable to tax as contemplated under section 41 (1) of the Act. Mr.Puj, learned advocate invited our attention to a decision of Allahabad High Court in the case of J.K.SYNTHETICS LTD. v. O.S.BAJPAI, INCOME-TAX OFFICER reported in 105 ITR at page 864. The assessee in that case was engaged in the manufacture of polymer chips. Excise Department was demanding excise duty on the product. The company used to make provision for payment of duty every year since 1964-65. This claim was consistently disallowed by the Income-tax Officer but was allowed by the Appellate Assistant Commissioner of Income-tax as a result of which a total sum of Rs.2,87,60,109 had been allowed to the company as deductions on account of excise duty for the assessment years 1964-65 to 1971-72. The company made a provision of Rs.2,08,29,436 in respect of its liability of excise duty for the previous year in question. The company preferred a writ petition under Article 226 of the Constitution of India before the High Court of Delhi challenging the order of the Collector of Central Excise demanding duty on polymer chips. The learned Single Judge hearing the petition allowed the same on 28.8.1970. On the basis of this judgment, the Income-tax Officer disallowed the deduction claimed by the company in respect of current liability and also treated the sum of Rs.2,87,60,109 on account of the past liability as income under section 41 of the Act and thus, a total sum of Rs.4,95,89,595 came to be added by way of income. The High Court pointed out as under:

"Now, admittedly, in the instant case deductions were allowed to the assessee on account of excise duty in the years 1964-65 to 1970-71. If the liability of the assessee can be said to have ceased in the relevant previous year, the assessee would clearly be liable to be assessed in respect of such liability. But the question is whether the liability can be said to have ceased in the instant case. It is not disputed that the decision of the Delhi High Court has not been accepted by the excise department. It has preferred a Letter's Patent Appeal which has been admitted and is pending. In our opinion, in such circumstances, the liability cannot be said to have ceased. A cessation of liability for the purposes of section 41 (1) of the Act would mean irrevocable cessation so that there is no possibility of the liability being revived in future. If there is such a possibility then the cessation is not complete and section 41 (1) is

> not attracted. The decision of the Delhi High Court is under appeal and there is a likelihood of its being reversed. It cannot, therefore, be said that on the date when the learned Single Judge of the Delhi High Court delivered his judgment the liability ceased. Indeed, there might be a further appeal to the Supreme Court. In these circumstances, the Income-tax Officer was not competent to invoke the provisions of section 41 (1) of the Income-tax Act because the decision of the learned single Judge of the Delhi High Court had lost its finality as a result of the appeal against it. A decision liable to appeal may be final until the appeal is not preferred but once an appeal is filed the decision loses its character of finality and becomes sub-judice, i.e. a matter under judicial enquiry. The appeal destroys the finality of the decision. This is the view expressed by the Calcutta High Court in Satyanarayana Prasad v. Diana Engineering Co. AIR 1952 Cal 124 and the Oudh Chief Court in Girja Dat Singh v. Gangotri Dat Singh AIR 1948 Oudh 88."

The matter was carried in appeal before the Apex Court. The decision in case of UNION OF INDIA & ANOTHER v. J.K.SYNTHETICS LTD. is reported in 199 ITR at page 14. Before the Apex Court, the question was whether assessee's liability to excise duty in certain matters had ceased justifying the action under section 41 (1) of the Act? The Apex Court pointed out that "it is obvious that the liability to tax under section 41 will depend on the outcome of appeal before this Court". Thus, it is very clear that cessation of liability can be postulated only after the final decision is rendered with regard to that liability.

6. Mr.Puj invited our attention to a decision of the Full Bench of this Court in the case of COMMISSIONER OF INCOME-TAX v. BHARAT IRON & STEEL INDUSTRIES reported in 199 ITR at page 67. In that case, the assessee was a registered partnership firm and the assessment year under reference was 1974-75, the previous year being financial year ending on March 1974. Central Excise Department recovered the amount by way of Central Excise Duty to which the company objected. The Company preferred appeal before the Appellate Collector, who allowed the appeal with a direction that the assessee would be entitled to the consequential relief. Assistant Collector despite the Appellate Collector's order and requests made by the assessee to refund the excise duty did not respond and

hence a writ petition was filed before this Court seeking a direction for refund of the excise duty alleged to have been illegally recovered. The assessee filed return of income in the year 1974-75 in August 1974. On 28.12.1974, Joint Secretary to the Government of India issued a notice to the assessee under section 36 (2) of the Central Excises and Salt Act, 1944 calling upon it to show cause as to why the order of the Appellate Collector of Central Excise, Bombay allowing the claim of refund should not be set aside. The assessee resisted the review or revision of the order of the Appellate Collector by its letter dated 26.2.1975. During pendency of the review or revisional proceedings before the Central Government, excise duty of Rs.1,81,427 was refunded to the assessee on 8.8.1975 and the proceeding under section 36 (2) of the Central Excise Act was dropped thereafter on 30.4.1976.

6.1 The Assessing Officer, in the course of assessment, invoked the provisions of section 41 (1) of the Act and included the aforesaid amount in the total income of the assessee for the assessment year 1974-75 on the ground that the assessee had become entitled to the refund of said amount under the order of the Appellate Collector on 1.8.1974. The Assessing Officer was of the view that as the Appellate Collector had passed the order under which the assessee had become entitled to the refund of excise duty in the year of account which ended on 31.3.1974 relevant to the assessment year 1974-75, the said amount was liable to be included in the assessee's total income for the said assessment year 1974-75. It may be noted at this stage that the amount was refunded on 8.8.1975. The Tribunal held that since the Central Government had not accepted the assessee's claim for refund, the Appellate Assistant Commissioner was right in holding that the amount had not accrued to the assessee in the year of account relevant to the accounting year 1974-75. The Tribunal upheld the view of the Appellate Assistant Commissioner that addition made by the Income-tax Officer was not justified.

6.2 The Full Bench in case of BHARAT IRON AND STEEL INDUSTRIES (supra) in concluding para observed as under"

" It was during the pendency of the review or revisional proceedings that the amount of Rs.1,81,427 was refunded to the assessee on August 8, 1975. The facts stated above clearly show that, in view of the pendency of the review or revisional proceedings, the assessee's claim for refund of the excise duty was in jeopardy.

In other words, there was no final decision on the question whether or not the assessee was entitled to claim refund of excise duty of Rs.1,81,427. It was only when the review or revisional proceedings were dropped on April 30, 1976, that the assessee bnecame finally entitled to claim refund of Rs.1,81,427. The payment of Rs.1,81,427 , which the assessee had received on August 8, 1975, was subject to the decision in the review or revisional proceedings. Having regard to the facts and circumstances stated above, in our opinion, the assessee obtained the refund of the excise duty amount only on April 30, 1976 - the date on which the review or revisional proceedings were dropped. The year of account of the assessee is the financial year and, therefore, the refund of excise duty of Rs.1,81,427 became includible in the assessee's total income for the assessment year 1976-77 under section 41 (1) of the Act. In our opinion, the Tribunal was right in holding that the said amount of Rs.1,81,427 was not chargeable to income-tax in the assessment year 1974-75."

7. Thus, even during the pendency of the proceedings if the amount of refund is received, the provisions contained in section 41 (1) of the Act cannot be invoked as there is no final decision on the question whether or not the assessee is entitled to claim the refund of excise duty.

8. In the case of CIT v. HINDUSTAN HOUSING AND LAND DEVELOPMENT TRUST LTD. reported in 161 ITR page 524, the Apex Court considered almost identical situation. The Full Bench in case of CIT v. BHARAT IRON AND STEEL INDUSTRIES (199 ITR 67) considered the facts of that case and observed:

"Certain lands belonging to the respondent-company which carried on the business of dealing in land and maintained its accounts on the mercantile system, were first requisitioned and then compulsorily acquired by the State Government. The Land Acquisition Officer awarded a sum of Rs.24,97,249 as compensation. On an appeal preferred by the respondent - company, the arbitrator made an award dated July 29, 1955, fixing the compensation at Rs.30,10,873 and directing the payment of interest of 5 per cent from the date of the acquisition. The arbitrator also awarded an annual sum for the period of

requisition. Thereupon, the State Government preferred an appeal to the High Court. Pending the appeal, the State Government deposited in the court Rs.7,36,691 being the additional amount payable under the award on April 25, 1956, and the respondent was permitted to withdraw that amount on May 9, 1956, only on furnishing a security bond for refunding the amount in the event of the appeal being allowed. On receiving the amount, the respondent credited it in its suspense account on the same date. The question was whether a sum of Rs.7,24,914 (the balance having been already taxed) could be taxed as the income of the respondent for the assessment year 1956-57 on the ground that it became payable pursuant to the arbitrator's award. The Tribunal held that the amount did not accrue to the respondent as its income during the relevant previous year ending on March 31, 1956, and was, therefore, not taxable in the assessment year 1956-57. On a reference, the High Court affirmed the decision of the Tribunal. On an appeal, affirming the decision of the High Court, it was held that although the award was made by the arbitrator on July 29, 1955, enhancing the amount of compensation payable to the respondent, the entire amount was in dispute in the appeal filed by the State Government. And the dispute was regarded by the court as real and substantial because the respondent was not permitted to withdraw the amount deposited by the State Government without furnishing a security bond for refunding the amount in the event of the appeal being allowed. There was no absolute right to receive the amount at that stage. If the appeals were allowed in their entirety, the right to payment of enhanced compensation would have fallen altogether. The extra amount of compensation of Rs.7,24,914 was not income arising or accruing to the respondent during the previous year relevant to the assessment year 1956-57. The Supreme Court affirmed the decisions of this court in TOPANDAS KUNDANMAL v. CIT [1978] 114 ITR 237 (Guj) and Addl. CIT v. New Jehangir Vakil Mills Co. Ltd. [1979] 117 ITR 849 (Guj.)".

9. In view of this decision, it is contended before us that mere receipt of refund would not attract the provisions contained in section 41 (1) of the Act as the proceedings were pending with regard to the refund. This

Court in the case of TOPANDAS KUNDANMAL v. CIT reported in 114 ITR page 237 has held that, if an assessee has got an inchoate right and has not acquired any vested right to enhanced or additional compensation over and above what has been offered to him by the Land Acquisition Officer, it cannot be said that he has a vested and complete right as to the interest on such amount. It is only when the amount of compensation is adjudicated upon by the court and it is only when the court awards interest on such enhanced amount of compensation that the assessee has an enforceable right to the principal amount of compensation as well as interest. In the instant case, after the Apex Court disposed of the matter raising real and substantial questions, it can be said that the adjudication attained finality.

10. Before us a submission was made with regard to mercantile accounting system and cash accounting system. According to the Revenue, in the instant case, as the assessee was maintaining cash system account, the moment the assessee received the amount, he was liable to be taxed and the moment he returns the amount, he will be entitled to claim benefit. One has to remember that there was no finality so far as the dispute is concerned. During pendency of the dispute, the amount was received. The Full Bench of this Court in the case of BHARAT IRON & STEEL INDUSTRIES (supra) held: "In our opinion, for considering taxability of amount coming within the mischief of section 41 (1) of the Act, the system of accounting followed by the assessee is of no relevance or consequence. We have to go by the language used in section 41 (1) of the Act to find out whether or not the amount was obtained by the assessee or whether or not some benefit in respect of trading liability by way of remission or cessation thereof was obtained by the assessee and it is in the previous year in which the amount or benefit, as the case may be, has been obtained that the amount or the value of the benefit would become chargeable to income-tax as income of that previous year".

11. In view of the decision of the Full Bench, the contention raised by the Revenue is required to be rejected. In case of BHARAT IRON & STEEL INDUSTRIES (supra), the Full Bench has laid down that ultimate cessation of the liability is on the final decision which culminates the dispute between the Revenue and the assessee. At the intermediary stage even if the amount of refund or part of refund is received in consequence of the court's order, provisions of section 41 (1) of the Act cannot be invoked.

12. In view of what is stated hereinabove, so far as Question No.1 at the instance of the assessee is concerned, our answer is in negative and in favour of the assessee and against the Revenue. So far as Question No.2 is concerned, in view of the answer to the first question, this Court need not answer the same. So far as the questions referred by the Revenue is concerned, in view of what we have said above, it would not be necessary to answer as the amount of refund under the aforesaid circumstances is not 'Income' for the period in question. Answer accordingly.

13. In view of the finding recorded hereinabove, Mr.Puj, learned advocate requested this Court to permit him to withdraw Special Civil Application No.6082 of 1999 so as to enable him to agitate further questions before the Commissioner of Income-tax (Appeals). Permission granted. Special Civil Application stands disposed of as withdrawn.

(KMG Thilake)
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